

*Buritz*  
*PM-91*

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# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

*[Claim for Backpay Based on Allegation of Administrative Delays in Appointment as Deputy U.S. Marshall]* *\$ 795*

FILE: B-191378

DATE: January 8, 1979

MATTER OF: Raymond J. DeLucia - Claim for Backpay

DIGEST: *for* Applicant for the position of Deputy U.S. Marshal who was offered an appointment and advised to "plan on reporting" on March 25, 1974, but whose date of appointment was delayed to May 13, 1974, is not entitled to backpay for the interim period ~~under the Back Pay Act of 1966, 5 U.S.C. 5596 (1976),~~ although the delay was inadvertent and the applicant quit his previous employment in reliance on the original advice, ~~since~~ he had no vested right to be appointed on March 25 and the delay was therefore not an "unjustified or unwarranted personnel action" under the Act.

This action is in response to correspondence received from Mr. Raymond J. DeLucia, 309 Lisa Court, Stockton, California 95210, in which he requested reconsideration of Settlement Certificate Z-2739672 dated October 18, 1977, issued by our Claims Division, disallowing his claim for backpay for the period March 25, 1974, to May 11, 1974, and other redress believed due on account of administrative delays he experienced in securing an appointment to the position of Deputy United States Marshal with the Department of Justice.

*AGC 37*  
*AGC 13*

It is indicated that between August 1973 and February 1974 Mr. DeLucia took the preliminary oral, written and physical examinations required of applicants seeking to become Deputy United States Marshals. By letter dated March 6, 1974, from the United States Marshals Service, Department of Justice, he was offered a position as Deputy U.S. Marshal at grade GS-5, and he was asked to "plan on reporting" on March 25, 1974. On March 21, 1974, however, he was advised in a telephone call from a representative of the U.S. Marshals Service that the offer of employment was being withdrawn. Consequently, he did not report for duty on March 25, but he did write to the U.S. Marshals Service to ask why he had not been selected.

By letter dated April 24, 1974, the U.S. Marshals Service responded with the following explanation: "Due to the large number of applicants for positions of Deputy U.S. Marshal our employment process has been overly burdened in administrative tasks and we inadvertently notified you as a non-select candidate." The offer of appointment was renewed,

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and Mr. DeLucia was asked to report for duty on May 13, 1974, if he decided to accept the offer. He entered on duty as a Deputy U.S. Marshal on May 13, 1974.

In December 1976 Mr. DeLucia filed a claim with this Office for backpay, annual and sick leave credit, and Civil Service retirement and tenure credit for the period March 25, 1974, to May 11, 1974. In substance, he suggested that he had been prevented from entering Federal service on March 25, 1974, due to an administrative error committed by governmental officials and was therefore entitled to redress. He also said that he had terminated his previous non-Federal employment on March 15, 1974, in reliance on the original advice and had thus suffered a loss of employment and income because of the delay in his appointment.

As previously indicated, however, the Claims Division of this Office disallowed the claim. In the settlement it was said that Mr. DeLucia had not entered on duty until May 13, 1974, and could therefore be compensated for prior pay periods only to the extent that his nonperformance of work was the consequence of his having undergone an unjustified or unwarranted personnel action within the terms of the Back Pay Act, 5 U.S.C. 5596. It was concluded that Mr. DeLucia had not suffered such action in the delay of his appointment and was therefore not entitled to the redress claimed.

Mr. DeLucia has questioned the correctness of that settlement. In essence, he has contended that the Department of Justice could have appointed him to the position of Deputy U.S. Marshal on March 25, 1974; that he was ready, willing and able to take the oath of office and enter on duty on that date; and that the inadvertent delay should be considered both an unwarranted and an unjustified personnel action.

An offer of public employment does not give rise to a contractual relationship in the conventional sense. Bers v. United States, 207 Ct. Cl. 941 (1975). As a general proposition one is not entitled to compensation until his appointment has been fully consummated by taking of the oath of office. We have recognized an exception where one enters on duty and performs actual work prior to appointment, finding in that situation that his taking the oath of office related back to the date of his entrance on duty. See Matter of Defense

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Manpower Commission, B-181294, November 8, 1974. However, in the case where an employee has not actually entered on duty, he may be compensated only to the extent that his nonperformance of work is the consequence of his having undergone an unjustified or unwarranted personnel action within the terms of the Back Pay Act of 1966, now 5 U.S.C. 5596 (1976).

Insofar as here pertinent, the Back Pay Act, 5 U.S.C. 5596, authorizes payment of compensation as follows:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

"(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

"(c) The Civil Service Commission shall prescribe regulations to carry out this section. \* \* \*" (Emphasis supplied.)

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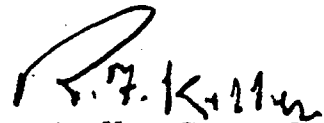
Implementing regulations promulgated by the Civil Service Commission under the Back Pay Act are set forth in 5 C.F.R., part 550, subpart H.

We have previously expressed the view that relief under the Back Pay Act may be granted to an individual whose date of appointment to a particular Federal position is mandated by law or regulation and his appointment is improperly delayed beyond the date prescribed. See Matter of Alec H. Stratton, 54 Comp. Gen. 1028 (1975). We have also expressed the view that redress under the Back Pay Act is available to an individual who has been duly appointed to a Federal position but is then improperly and unlawfully restrained from performing the duties of his position. See B-175373, April 21, 1972. However, in the ordinary case the decision to appoint or promote an individual in the Federal service is left to the discretion of the employing agency, and we have held that in such case the agency's action in not hiring or promoting the individual on the date he expected or would have preferred, does not constitute an "unjustified or unwarranted personnel action" under the Back Pay Act. This is so even though it appears that the appointment or promotion may have been delayed through error or an unusually heavy agency workload in the processing of personnel actions, since the employee in such case has no vested right under law or regulation to be appointed or promoted in any event. See Matter of Leonard Ross, B-183440, August 12, 1975; Matter of Adrienne Ahearn et al., B-186649, January 3, 1977; and B-183969/B-183985, July 2, 1975.

In the present case, it does not appear that any provision of law or regulation mandated the appointment of Mr. DeLucia to the position of Deputy U.S. Marshal on March 25, 1974. Rather, it appears that the date he was to be appointed, if at all, was a matter within the discretion of the United States Marshals Service, Department of Justice. Hence, it is our view that the agency's action in delaying his date of appointment and entry on duty does not constitute an "unjustified or unwarranted personnel action" under the Back Pay Act. In that connection, it is immaterial that Mr. DeLucia terminated his previous employment on March 15, 1974, on the basis of his expectation that he would be appointed a Deputy U.S. Marshal on March 25, since his election to resign from such prior employment could not, as a matter of law, operate to deprive the United States Marshals Service of its discretionary authority in the matter.

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Accordingly, the settlement of our Claims Division is sustained.

  
Deputy Comptroller General  
of the United States